

## INTERNATIONAL TRADE ALERT

### TREASURY ISSUES PROPOSED CFIUS REGULATIONS IMPLEMENTING FINSA AMENDMENTS TO EXON-FLORIO



The Department of the Treasury has issued proposed regulations that would implement the Foreign Investment and National Security Act of 2007 (FINSA), which reforms the process by which the multi-agency Committee on Foreign Investment in the United States (CFIUS, or the Committee) reviews acquisitions of U.S. businesses by foreign persons pursuant to section 721 of the Defense Production Act of 1950 (the so-called “Exon-Florio” law) in order to determine whether such transactions pose a threat to U.S. national security. FINSA was prompted by several high-profile deals that provoked questions as to whether existing CFIUS structure and practice adequately addressed the dual goals of protecting U.S. national security and promoting foreign investment in the United States.

While the proposed regulations retain many basic features of the current rules and utilize similar language, there are numerous significant changes. Moreover, the clear message from these proposed rules is that each transaction will be considered on a case-by-case basis, with a determination to be made based on the specific facts and circumstances of the transaction. The following summarizes key provisions of the proposed regulations.

#### PREFILING

The regulations make a strong and explicit recommendation that parties consult with CFIUS before formally filing their joint notice, including submitting a draft of the notice, in order to facilitate the Committee’s review once the proceeding commences. CFIUS also intends to publish guidance on certain transactions, especially those in which the acquiring entity is foreign government controlled, that will identify the types of information the Committee considers useful in its review.

#### CONTENTS OF NOTICE

The regulations expand the types of information required in the notice to reflect certain questions that CFIUS now routinely asks of notifying parties. For example, the notice would now require an organization chart for the foreign person, the transaction value, the identity of

financial institutions with a role in the transaction, a description of any emergent technologies of the U.S. company that would be export controlled and a statement whether either party has been involved previously in a CFIUS proceeding. Each party must certify the accuracy and completeness of the notice, the transaction description and any follow-up information submitted. CFIUS will not initiate a review if the certification is not provided or is incomplete. The foreign person must submit separately personal identifier information for its board of directors and senior officers.

## DEFINITIONS OF KEY CONCEPTS

1. *Covered transaction*: A “covered transaction” is a merger, acquisition or takeover by or with a foreign person that could result in foreign control of a person engaged in interstate commerce in the United States. Certain joint ventures, e.g., where the U.S. party contributes a U.S. business, and long-term leases are treated as covered transactions, but start-ups and greenfield investments generally are not. The regulations provide more examples of transactions that are and are not covered. The regulations preserve the passive investment safe harbor for acquisitions of 10 percent or less of the voting interest of a U.S. business, but only where the acquisition is made “solely for the purpose of investment.” Treasury makes clear that there is no absolute exemption for investments below this threshold; rather, they will be reviewed if the foreign person has the capability and intention to control the U.S. entity, possesses or develops any purpose other than investment, or acts in a way that is inconsistent with an intent to hold the interest solely for the purpose of investment. The proposed regulations do not contain any special rules for sovereign wealth funds. Rather, they are treated as any other “foreign government-controlled transaction,” i.e., subject to further investigation following the initial review unless waived by the lead agency and Treasury.
2. *Control*: This is a threshold concept used in the definition of several other key terms, such as “covered transaction,” “foreign person” and “foreign government-controlled transaction.” The proposed definition is substantially similar to the existing definition and retains the long-standing approach of defining control in functional terms as the ability of the foreign person to exercise certain powers over important matters affecting the U.S. business. There is no bright-line test, such as a specific percentage of shares or number of board seats. Rather, CFIUS will look at all relevant factors considered together in light of their potential impact on a foreign person’s ability to determine, direct or decide these matters. The regulations offer a list of exemplary matters deemed to be important in this regard. They also identify certain minority shareholder protections that are not considered to confer control over the entity. While Treasury states that acquiring influence falling short of control is not sufficient to bring a transaction under CFIUS purview, the proposed definition of “control” includes the ability to “cause” decisions about important matters, which suggests that influence may well be a factor to consider.
3. *Critical infrastructure*: The proposed regulations essentially adopt the broad definition from FINSA, which means systems and assets so vital to the United States that their incapacity or destruction would have a debilitating impact on the United States. No specific business sectors are identified in the definition and no examples are provided.
4. *Critical technologies*: The term is defined with reference to existing regulatory regimes that deal with sensitive goods, technologies and services. This includes items controlled under the International Traffic in Arms Regulations (ITAR) and the Export Administration Regulations (EAR), nuclear equipment and material, and select agents and toxins.

5. *U.S. business*: This term replaces the term “U.S. person” and is defined as any entity engaged in interstate commerce in the United States, but only to the extent of its activities in the United States.

**COMMENTS AND HEARING**

The proposed regulations will be published in *The Federal Register* on April 23, 2008. Written comments on the proposed regulations may be submitted no later than June 9, 2008. Treasury will hold a public meeting on this matter on May 2, 2008. Final regulations will be published after comments have been considered.

**CONTACT INFORMATION**

If you have any queries regarding the scope of the Directive or its practical consequences, please contact:

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